IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATIONs No.6697, 6699 & 6722 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE JAYANT PATEL

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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S.M. RAMI - Petitioner(s)

Versus

STATE OF GUJARAT & 3 - Respondent(s)

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Appearance :

MR AS SUPEHIA for Petitioner(s) : 1,
MR DIPEN DESAI, Ld. AGP for Respondent(s) : 1, in SCA 6697 & 6699 of 2005 and MS REETA CHANDARAN, Ld. AGP for State in SCA 6722/2005
NOTICE SERVED BY DS for Respondent(s) : 1,3 - 4.
MR HS MUNSHAW for Respondent(s) : 2,

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CORAM : HONOURABLE MR.JUSTICE JAYANT PATEL

Date : 23/11/2005

COMMON ORAL JUDGMENT

1.Rule. Mr.Desai, learned AGP wavies service of rule in SCAs No.6697 and 6699 of 2005 and Ms.Reeta Chandarana, learned AGP waives service of rule in SCA No.6722 of

2005 and Mr.Barot with Mr.Munshaw, learned Counsel for Respondent No.2 – District Panchayat waive service of rule. With the consent of the parties, the matters are taken up for final hearing today.

2. As the issues involved in all the petitions are common they are considered by this common judgement.

3. The short facts of the case are that as per the order dated 10.1.1995, the pay fixation for the post of Sanitary Inspector/Vaccination Supervisor was fixed by the District Health Officer and accordingly, as against the pay-scale of Rs.1200-2040, the pay fixed was of Rs.1400-2600. It is the case of the petitioners that on the basis of the said fixation of the pay-scale when the pay came to be revised the equivalent pay-scale was also fixed of Rs.5,000-150-8000 and the said refixation in the revised scale came to be audited and the petitioners were paid the said scale and it is an admitted position that all the petitioners have by now retired from service.

4. By impugned order dated 12.9.2003, the petitioners were intimated that the higher pay-scale fixed was not proper and the local audit department has raised objection and, therefore, the amount of Rs.20,594/- from the petitioner of Special Civil Application

No.6697 of 2005, the amount of Rs.18,030/- from the petitioner of Special Civil Application No.6722 of 2005 and the amount of Rs.18,030/- from the petitioners of Special Civil Application No.6699 of 2005 were ordered to be recovered. It appears that the petitioners made representations against the said order and as per the communication dated 27.5.2004 (Annexure “F”) it has been stated that the petitioners were entitled to the pay-scale of Rs.1400-2300 and consequently the equivalent pay in the revised pay-scale is Rs.4500-125-7000 and not Rs.5000-150-8000 and, therefore, w.e.f. 1.1.1996 the higher pay-scale of the petitioners is fixed at Rs.4,500-125-7000 and the recovery is also sought to be effected of the difference. It is under these circumstances, the petitioners have approached this Court by preferring these petitions.

5. Heard Mr.Supehia, learned Counsel for the petitioners, Mr.Desai and Ms.Reeta Chandaran, learned AGPs for the State Authorities and Mr.Barot with Mr.Munshaw, learned Counsel for the respondent District Panchayat.

6. So far as the fixation of the pay-scale and the rectification of the mistake in fixation of the pay-scale and/or modification of the pay-scale after the payment is already made as per the earlier pay-scale,

the matter can be segregated into two parts; one aspect would for the recovery of the amount of difference from the employee concerned due to wrong fixation of pay-scale and the another aspect would be for giving prospective effect to the refixation of the pay-scale. So far as the first aspect is concerned, the position of law is settled in as much as once the payment is already made on the basis of the pay-scale fixed by the competent authority, merely because the another authority subsequently found that the pay-scale was wrongly fixed or there was a mistake or modification is required in the said decision, would not be justifiable ground for effecting recovery of the difference from the employee concerned. The reference may be made to the decision of this Court dated 28.11.2003 in Special Civil Application No.6006 to 6008 of 2002, wherein after following the decision of Division Bench decision of this Court as well as the decision of the Apex Court, it was observed by this Court at paragraphs 7 and 8 as under:

> *7. In view of the above, what is required to be noted is that there is no dispute on the point that pursuant to the decision of the higher authority the payscale in the higher grade was granted to the petitioner and after a period of about more than 4 years the decision is taken of cancelling the earlier decision and as a consequence thereof recovery is sought*

to be effected. It is not the case of the respondents that the higher payscale came to be granted on account of fraud or misrepresentation or any misdeed which can be attributed to the concerned employee. Therefore, it appears that it is on account of subsequent change of decision by the authority without attributing anything to the concerned employee the decision is cancelled and the recovery is sought to be effected. Therefore, under the circumstances, it will have to be examined as to whether such an act on the part of respondents is permitted under law or not.

8. In case of I.C.Patel (supra) the division bench of this court observed as under:

"The mistake was committed by the Board for which the appellant should not be penalised. Recovery of excess payment made to the appellant for no fault on his part appears to be wholly unjustified."

In case of P.H.Reddy (supra) the Apex Court also found that the order of fixation passed by the appropriate authority does not require any interference. Still however, the Apex Court observed as under:

"The employees-appellant, who had been in receipt of a higher amount on account of erroneous fixation by the authority should not be asked to repay the excess pay drawn, and therefore, that part of the order of the authority is set aside."

7.Mr.Supehia, learned Counsel during the course of the hearing has drawn the attention of this Court to the order of the Division Bench of this Court (Coram: B.J.Shethna and Sharad D. Dave, J.J.) in LPA No.750 of 2003 dated 16.12.2004, whereby the order of the Single Bench is confirmed and he further submitted that the Special Leave to Appeal (Civil) Nos.6775-6777 of 2005 were also preferred before the Hon'bl Supreme Court,

which came to be dismissed as per the decision dated 25.7.2005 of the Hon'ble Supreme Court.

8. In view of the above settled legal position, as the mistake of fixation of the pay-scale cannot be attributed to the petitioners, the recovery of the excess amount paid to the petitioners for no fault on their part is not only unjustifiable but cannot be sustained in the eye of law. The aforesaid would be the consequential position even in respect of the present case and the reason being that the pay-scale of the petitioners were fixed by the District Health Officer and except mistake nothing is attributed to any of the petitioners and, therefore, the recovery of the salary and other consequential benefits already paid to the petitioners prior to the order dated 27.5.2004 (Annexure “F”) cannot be effected and the impugned order to that extent, in any case, cannot be maintained as against the settled legal position.

9. If the second aspect is considered for the purpose of examining the legality and validity of the action for refixation of pay-scale from Rs.5000-150-8000 to Rs.4,500-125-7000, it appears that it is an admitted position that no opportunity of hearing has been given to any of the petitioners by the District Health Officer before passing the impugned order dated

27.5.2004. Mr.Supehia, learned Counsel for the petitioners, additionally submitted that as such when the earlier pay-scale was fixed, it was duly audited and the auditor had approved the same and thereafter merely because subsequently in the audit the objection raised, is no valid ground for withdrawing the benefits already conferred of the higher pay-scale.

10. Mr.Desai, learned AGP as well as the learned Counsel for the District Panchayat, on the other hand, submitted that there was a mistake in fixation of the pay-scale and they were not aware as to whether the earlier fixation of the pay-scale was audited and was approved by the auditor or not.

11. In my view, at this stage, the said aspect is not necessary to be examined by this Court, more particularly when the order is passed without giving any opportunity of hearing to the petitioner and it would be for the authority to examine the same after giving opportunity of hearing to the petitioners concerned and to render the decision finally as to whether the pay-scale of the petitioners concerned should be fixed at Rs.4500-125-7000 or Rs.5000-150-80000. It deserves to be clarified that whatever may be the decision, the same will have the effect prospectively after 27.5.2004 only and not prior that

to.

12. In view of the aforesaid, the decision of the respondent authority of recovering the difference for the period prior to 27.5.2004 by refixing the pay-scale is quashed and set aside and in case any amount is recovered by the authority from the petitioners concerned, the same shall be refunded to the petitioners within a period of three months from the date of receipt of the order of this Court.

13. So far as the fixation of pay-scale after 27.5.2004 is concerned, opportunity shall be given to the petitioners by the District Health Officer and after considering all the aspects, it would be open to the District Health Officer to refix the pay-scale of the petitioner, either in the same pay-scale of Rs.5000-150-8000 or, if there are lawful justification, then in the pay-scale of Rs.4500-125-7000. However, the such decision will have the effect after 27.5.2004 onwards only.

14. The aforesaid exercise of refixation of the pay-scale w.e.f. 27.5.2004 onwards shall be completed after giving opportunity of hearing to the petitioners preferably within a period of four months from the date of receipt of the order of this Court.

15. It is made clear that the order passed by the

authority after giving opportunity of hearing to the petitioners shall not prejudice the rights of the petitioners to challenge the same in accordance with law, if otherwise permissible in law.

16. Rule partly made absolute to the aforesaid extent. Considering the facts and circumstances, there shall be no order as to costs.

23.11.2005 **(Jayant Patel, J.)**

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